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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1090

WILLIE LEE TERRELL, JR.,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
To the United States
Court of Appeals for the Fifth Circuit

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IN THE SUPREME COURT
OF THE UNITED STATES

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NO.

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Willie Lee Terrell, Jr., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals

for the Fifth Circuit entered in the above entitled case on January 20, 1975.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit was not published, but is included in the appendix as Exhibit A. No opinion was rendered by the United States District Court for the Southern District of Florida. A copy of the judgment of such Court is included in the appendix as Exhibit B.

Jurisdiction

The judgment of the Court of Appeals was entered on January 29, 1975. No petition for rehearing was filed. This Court has jurisdiction to review this case under 28 U.S.C. §1254(1).

Questions Presented

1. Whether, in a criminal tax pro-

secution, an individual is entitled to a charge that his financial circumstances should be considered in determining willfulness; and a charge to the effect that an act or omission is not willful if the person believes it justified.

2. Whether §3121(o) of the Internal Revenue Code of 1954 is unconstitutional since it creates an irrebuttable presumption of fact in violation of the due process clause of the Fifth Amendment.

Constitutional Provisions and Statutes Involved

United States Constitution
Amendment V

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be com-

pelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

26 U.S.C. §3121(o)

"Crew Leader.--For purposes of this chapter, the term 'crew leader' means an individual who furnishes individuals to perform agricultural labor for another person, if such individual pays (either on his own behalf or on behalf of such person) the individuals so furnished by him for the agricultural labor performed by them and if such individual has not entered into a written agreement with such person whereby such individual has been designated as an employee of such person; and such individuals furnished by the crew leader to perform agricultural labor for another person shall be deemed to be the employees of such crew leader. For purposes of this chapter and chapter 2, a crew leader shall, with respect to service performed in furnishing individuals to perform agricultural labor for another person and service performed as a member of the crew, be deemed not to be an employee of such other person."

26 U.S.C. §7202

"Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for any pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

26 U.S.C. §7203

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the cost of prosecution."

Statement of the Case

The defendant was convicted on two counts of willfully failing to truthfully account for and pay over to the Internal Revenue Service employment taxes imposed by §§3101 and 3111 of the Code in violation of §7202 of the Code, and on two counts of failing to file an Employer's Annual Tax Return for Agricultural Employees for each of the years 1970 and 1971 in violation of §7203 of the Code.

The facts in this case were not in dispute. The defendant was a "crew leader" during the years in question, i.e. an individual who obtained and delivered migrant labor to perform agricultural services. In this case, the farmer was Flavor-Pict. Defendant received $1.65 per hour for his services;

$1.00 per day for each migrant worker delivered; and an amount from Flavor-Pict to cover the employer's share of FICA taxes and minimal accounting costs. As a condition to his services, defendant was required to furnish a bus for transporting migrant labor, and a pickup truck.

In addition to his activities as a crew leader, defendant did some hauling for Flavor-Pict from time to time.During the years 1970 and 1971, defendant received $18,000.00 and $17,000.00, respectively, from Flavor-Pict, which included the employer's share of the taxes.

At the trial, defendant testified at length as to the expenses of operating his business, and the total lack of funds to satisfy tax liabilities after

the payment of other expenses. He admitted that he was aware of the tax liabilities, but that he preferred other creditors over the United States because the other creditors would have repossessed his automotive equipment and put him out of business. He also testified that he had a long history of paying his tax liabilities late; that he had, in the past, worked matters out with the Internal Revenue Service; and that it was his belief that he was required to file returns only if he had the money to pay, since that was the procedure he had consistently followed.

Based upon the foregoing, the defendant requested charges to the effect that financial circumstances should be considered in determining willfullness; and that conduct was not willful if the

person believed it to be justified. The Court refused both charges.

In addition, the existence of an employer status is an essential element of the crime. In this connection, §3121(o) of the Code defines an employer as including a crew leader, which is defined as follows:

> "***the term 'crew leader' means an individual who furnishes individuals to perform agricultural labor for another person if such individual pays (either on his own behalf or on behalf of such person) the individuals so furnished by him for the agricultural labor performed by then***and such individuals furnished by the crew leader to perform agricultural labor for another person shall be deemed to be the employees of such crew leader."

At the trial, it was contended that such creates an irrebuttable presumption; that such results in classifying an individual as an employer without re-

gard to the actual facts of the controversy; and that such an irrebuttable presumption violates the due process clause of the Fifth Amendment.

Basis for Federal Jurisdiction

The basis for federal jurisdiction in the Court of first instance is 18 U.S.C. §3231.

Reasons for Granting this Writ

Defendant's arguments can be divided into two parts, to wit: (1) that relating to the impropriety of the charge with respect to willfulness in a federal tax offense; and (2) that relating to the constitutionality of §3121(o).

With respect to the charge, it is submitted that the holding of the Fifth Circuit in this case is in direct conflict with the decision of the Ninth Circuit in Wilson v. U.S. 250 F. 2d 312

(9th .Cir. 1957); and does follow the rationale of Abdul v. U.S. 254 F. 2d 292 (9th Cir.1958), which rationale was specifically rejected by this Court in U.S. v. Bishop 412 U.S. 346 (1973)

More specifically, the taxpayer here, as in Wilson, defended on the grounds that the use of funds to maintain a business as opposed to utilizing those funds to satisfy tax liabilities should be considered in determining willfulness. The evidence in both cases showed the lack of funds, and in Wilson, the Court held that such should be considered in determining willfulness. The District Court and Fifth Circuit in this case effectively held to the contrary by refusing any charge relating to financial circumstances.

Here, also, as in Abdul, the defense

against the failure to file was a misunderstanding of his duty to file tax returns. In this instance, the defendant testified that he believed that he could not file the returns until he was able to make payment. Although the Ninth Circuit in Abdul held that such was not a proper defense, such holding was specifically rejected by this Court in Bishop. In effect, the Fifth Circuit here, as did the Ninth Circuit in Abdul, refused to give any consideration to the fact that the defendant believed his conduct to be justified.

The second facet of defendant's argument relates to the constitutionality of §3131(o) of the Code. That section, in effect, contains a conclusive presumption that a crew leader is an employer, without regard to the actual

facts and circumstances. In effect, this statute created an irrebuttable presumption, and it is this classification without regard to the actual facts that renders the statute in question so arbitrary and unreasonable that it cannot stand under the Fifth Amendment. Heiner v. Donnan 285 U.S. 312 (1932); Vlandis v. Kline 412 U.S. 441 (1973).

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert O. Rogers
Counsel for Petitioner
400 Royal Palm Way
Palm Beach, Florida

Certificate of Service

I hereby certify that on the 14th day of March, 1975, the foregoing petition for a Writ of certiorari was served upon the Respondent by mailing a copy thereof by United States mail, postage prepaid, as follows:

Mr. Meade Whitaker
Chief Counsel
Internal Revenue Service
Washington, D.C. 20224

Mr. Robert Bork
Solicitor General
Room 5612
U. S. Department of Justice
Washington, D.C. 20530

Robert O. Rogers
Counsel for Petitioner

Exhibit A

In the United States Court of Appeals
For the Fifth Circuit

No. 74-3074

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

WILLIE LEE TERRELL, JR.,
Defendant-Appellant

Appeal from the United States District Court fof the Southern District of Florida

(January 29, 1975)

Before GEWIN, BELL and CLARK, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21.[1]

Appellant was convicted of knowingly and willfully failing to make an employer's annual tax return for agricultural laborers and knowingly and willfully failing to truthfully account for and

1/See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F. 2d 966.

pay taxes pursuant to the Federal Insurance Contributions Act in violation of 26 U.S.C. §§7202 and 7203. The years 1970 and 1971 are involved. On this appeal he contends that (1)26 U.S.C. §2131(o) defining the term "crew leader" is unconstitutional; (2) the court erred in refusing to charge the jury that the financial status of the appellant should be considered in determining willfulness; and (3) the court erred in refusing to charge the jury that his conduct was not willful if he honestly believed it to be justified. After a thorough examination of the briefs,the record and the contentions of appellant at oral argument we find no merit in any of his alleged errors.

Exhibit B

JUDGMENT AND COMMITMENT

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA)
)NO.74-349-Cr-CF
versus)
)Filed: 7-26-74
WILLIE LEE TERRELL, JR.)

On this 26th day of July, 1974, came the attorney for the government and the defendant appeared in person and by David S. Meisel, Esq., Counsel.

It is Adjudged that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of knowingly failing to make a 1970 and 1971 Employer's Annual Tax Return for Agricultural Employees, IRS form 943, with either the District Director of the Internal Revenue Service at Jacksonville,

Florida, or with the Director, Southeast Service Center, Chamblee,Georgia, all in violation of Title 26, United States Code, §7203, and wilfully failing to truthfully account for and pay over to the Internal Revenue Service Federal Insurance Contributions Act taxes due respectively January 31, 1971, and January 31, 1972; all in violation of Title 26, United States Code, §7202, as charged in the Information, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the

Attorney General or his authorized representative for imprisonment for a period of ONE (1) MONTH or until otherwise discharged as to each of Counts I and III, sentences of confinement to run concurrently with each other, and EIGHTEEN (18) MONTHS or until otherwise discharged as to each of Counts II and IV, sentences of confinement to run concurrently with each other, it being further

ORDERED and ADJUDGED, pursuant to the split-sentence provision of Title 18, United States Code, Chapter 231, §3651, that the defendant be confined to a jail-type institution for a period of THREE (3) MONTHS as to each of Counts II and IV, sentences of confinement to run concurrently with each other, it being further

ORDERED and ADJUDGED that the sentences imposed in Counts II and IV shall run consecutively with those imposed in Counts I and III, thus making a total period of incarceration of FOUR (4) MONTHS, it being further

ORDERED and ADJUDGED that the remainder of sentences of confinement as to Counts II and IV shall be suspended, and commencing immediately upon discharge from incarceration, the defendant shall be placed on probation for a period of TWO (2) YEARS under the Standing Conditions of Probation as defined by the Court's Order entered August 1, 1964, it being further

ORDERED and ADJUDGED that in addition to the terms of imprisonment hereinabove imposed, the defendant shall pay a fine onto the United States of America in the

sum of $1,000.00 on each of Counts II and IV, totalling $2,000.00, it being further

ORDERED and ADJUDGED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ Charles B. Fulton
Chief U. S. District Judge

cc: U.S. Attorney
U.S. Probation
U.S. Marshal
David S. Meisel, Esq.

Certified to be a true and correct copy of the original,
Joseph I. Bogart, Clerk
U.S.District Court
Southern Dist. of Fla.
By: s/ Susan Ringlein
Dy. Clerk
7-26-74

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1090

WILLIE LEE TERRELL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was found guilty on all four counts of an information charging him with two counts of failing to file employer's annual tax returns for agricultural employees for the years 1970 and 1971, in violation of 26 U.S.C. 7203, and two counts of failing to account for and pay over taxes collected by him as a crew leader during the same years, in violation of 26 U.S.C. 7202 (App. 1-4).[1] Petitioner was sentenced to concurrent terms of one month on two of the counts, and concurrent terms of 18 months on the remaining two counts. Pursuant to 18 U.S.C. 3651, the court ordered petitioner to be imprisoned for a total of four months. Petitioner was also fined $2,000 (Pet. 18-21). The court of appeals affirmed (Pet. 15-16).

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[1] "App." refers to the appendix filed in the court of appeals.

Petitioner raises two contentions: (1) that the jury was not properly instructed with respect to the element of willfulness; and (2) that the statute classifying petitioner as an employer of certain farm workers is unconstitutional.

1. With respect to the element of willfulness, the trial court charged the jury as follows (App. 106-107):

> I charge you that the word "wilfully" as used in this Information means a voluntary and intentional violation of a known legal duty. Therefore, an act is done wilfully if it is done knowingly and voluntarily and intentionally, and with the specific intent to do something which the law forbids, that is to say with a bad or evil purpose either to disobey or to disregard the law.
>
> Conversely, an omission or failure to perform an act required by the law is wilful if the defendant knew that the act was required by the law and if the defendant voluntarily and intentionally, and without justifiable cause, failed to perform the legally required act, that is to say, the non-performance of a required act was voluntary and deliberate and resulted from a bad or evil purpose on the part of the defendant to disregard or to disobey the law.

This instruction adheres to this Court's definition of willfulness in criminal tax cases. *United States* v. *Bishop*, 412 U.S. 346. Contrary to petitioner's requested instruction,[2] the government was not required to prove an affirmative act of evasion because this was not an evasion

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[2]The requested instruction read as follows (App. 122):

> In order to sustain a conviction under §7202, you must find that the defendant willfully failed to account for and willfully failed

case. The information alleged only acts of omission. Thus, the instruction requested by petitioner could only have misled the jury. Cf. *Spies* v. *United States*, 317 U.S. 492.

Petitioner relies (Pet. 10-11) upon *Wilson* v. *United States*, 250 F.2d 312 (C.A. 9). That case, however, involved a prosecution for evasion of payment of certain taxes. It was tried to the court without a jury. Unlike this case, the conviction in *Wilson* was reversed because the trial court failed to give consideration to testimony regarding the defendant's inability to pay. Here, however, the jury was required under the trial court's instructions to consider petitioner's defenses (App. 62) that he had no money to pay the 1970 and 1971 tax and that he believed he was required to file returns only if he had the money to pay the tax. Cf. *United States* v. *Rosenfield*, 469 F.2d 598, 601 (C.A. 3), certiorari denied, 411 U.S. 932.

2. Petitioner further argues (Pet. 12-13) that 26 U.S.C. 3121(*o*), which defines the circumstances under which a crew leader is an employer of farm laborers for purposes of the Federal Insurance Contributions Act (Social Security), is unconstitutional. That statute treats a crew leader as an employer if (1) he actually furnishes individuals to perform agricultural labor for another person; (2) he actually pays the individuals so furnished; and (3) he has not entered into a written agreement with the other person

---

to pay over the taxes. The fact that he failed to pay the tax or that he intentionally preferred other creditors over the United States is not, standing alone, proof of willfulness.

There must be evidence of an affirmative act on the part of the defendant to evade the payment of taxes. Proof that the taxpayer failed to pay over taxes because he was motivated by reason of a desire to preserve business or because of a financial inability to pay does not establish the required affirmative conduct. It must be shown that his failure was due to an intent to evade tax. [Footnotes omitted.]

whereby the individuals are designated employees of the other person. This is a reasonable classification, which reflects several of the common law indices of an employer and such a legislative classification will not be set aside if it can be rationally justified under any state of facts. See, *e.g.*, *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6, and cases cited therein; *Shanahan* v. *United States*, 447 F.2d 1082 (C.A. 10).

The reasonableness of the statutory test regarding the circumstances under which a crew leader is an employer is amply demonstrated by the Senate committee which reported out the bill (Social Security Amendments of 1956, Sec. 105(b), 70 Stat. 828). In its report (S. Rep. No. 2133, 84th Cong., 2d Sess. (1956)), the Senate committee stated (p. 12):

> Your committee believes that deeming the crew leader to be the employer of the individuals he recruits and pays would simplify the reporting of workers for social-security purposes, and would also be to the advantage of many of the farm workers who customarily work as members of a crew. Since they generally work for the same crew leader longer than for a single farm operator, they will have a better chance of having their farm work covered by old-age and survivors insurance. Also, a larger proportion of their farm wages will be covered if the crew leader is the employer.

Heiner v. *Donnan*, 285 U.S. 312 (see also *Vlandis* v. *Kline*, 412 U.S. 441), relied upon by petitioner (Pet. 13), does not support his claim that Section 3121(*o*) is unconstitutional. As this Court pointed out in *Helvering* v. *City Bank Farmers Trust Co.*, 296 U.S. 85, and as the Tenth Circuit noted in *Shanahan* v. *United States, supra*, the presumption involved in *Heiner* was invalidated because, in the Court's view, it created an unreasonable classifi-

cation. *Vlandis* was decided on the same basis. 412 U.S. at 446. Compare *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 363, 376-378. Section 3121(*o*), in contrast, provides a reasonable set of criteria, which, if met, establish that a crew leader is an employer for purposes of the Social Security Act.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.